

JAN 25 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TYRRALL FARROW CANNON,

Petitioner - Appellant,

v.

PEOPLE OF THE STATE OF
CALIFORNIA; JAMES HALL, Warden,

Respondents - Appellees.

No. 04-57044

D.C. No. CV-04-01287-CJC

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Submitted January 13, 2006^{**}
Pasadena, California

Before: SCHROEDER, Chief Judge, FRIEDMAN^{***} and FISHER, Circuit
Judges.

^{*}This disposition is not appropriate for publication and may not be cited to
or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**}This panel unanimously finds this case suitable for decision without oral
argument. *See* Fed. R. App. P. 34(a)(2).

^{***}The Honorable Daniel M. Friedman, Senior United States Circuit Judge
for the Federal Circuit, sitting by designation.

Tyrrall Cannon appeals the district court's dismissal without prejudice of his 28 U.S.C. § 2254 habeas petition. This court granted a certificate of appealability as to only one issue: whether the district court properly dismissed Cannon's petition as unexhausted because Cannon had a petition for writ of habeas corpus pending in the California Supreme Court.¹ In dismissing Cannon's habeas petition, the district court, citing *Rose v. Lundy*, 455 U.S. 509, 522 (1982), noted that it was required to dismiss mixed petitions. Since the district court's ruling, the Supreme Court has decided *Rhines v. Weber*, 125 S. Ct. 1528 (2005), in which it held that district courts have the discretion to stay and hold in abeyance, rather than dismiss, a mixed habeas petition in "limited circumstances" where the petitioner establishes "good cause for [his] failure to exhaust his claims first in state court." *Id.* at 1535. Accordingly, we vacate the district court's dismissal and remand the habeas petition for reconsideration in light of *Rhines v. Weber*. See *Jackson v. Roe*, 425 F.3d 654, 655 (9th Cir. 2005). If the court concludes that Cannon's claims have

¹ Cannon has filed numerous habeas petitions in both state and federal court. As of the time he filed the instant petition, the California Supreme Court had already rejected, on direct review, Cannon's challenge to his conviction, case # S126599, and had a habeas petition pending before it, case #S126486. <http://appellatecases.courtinfo.ca.gov/> (last visited December 20, 2005).

“since been exhausted, there may no longer be a need to stay the proceedings.

Instead the district court could consider the [claims] . . . on the merits.” *Id.* at 662.²

VACATED and REMANDED.

² Because we are vacating and remanding the district court’s dismissal, we express no opinion as to Cannon’s additional claim that his incompetence excuses the exhaustion requirement.